Richmond Electrical Services, Inc. *and* International Brotherhood of Electrical Workers, Local 666, AFL–CIO. Case 5–CA–31680

October 24, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 27, 2004, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions; the General Counsel filed an answering brief; the Respondent filed a reply brief to the General Counsel's answering brief; the General Counsel filed cross-exceptions and a supporting brief; and the Respondent filed an answering brief to the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its final contract proposals before the parties had reached an impasse in bargaining. We reverse those findings.

I. FACTS

The Respondent is a small electrical contracting company based in Richmond, Virginia. In 1996, the Board certified the Union as the exclusive representative of certain of its employees.[2] The parties' most recent collective-bargaining agreement was effective through November 30, 2003.

In August 2003,[3] the Respondent and the Union exchanged written proposals for a successor collective-bargaining agreement to the expiring agreement. The parties held their first face-to-face bargaining session on October 21. Among the matters that the Respondent considered "key" at that session were its proposal to reduce the hourly wage of journeymen wiremen from $23.17 to $20.17 and its proposal to modify the scope of the bargaining unit.[4] The Union counterproposed raising the wage to $25.17; it rejected the Respondent's proposal to alter the scope of the bargaining unit.

The Union was also a signatory to a multiemployer collective-bargaining agreement with the local chapter of the National Electrical Contractors Association (NECA). The NECA agreement covered 56 electrical contractors, but did not include the Respondent, which was not a NECA member. The NECA agreement included a "most-favored-nation" clause, which assured signatory contractors the benefit of any more favorable terms that the Union subsequently negotiated with non-NECA contractors. The Union was also a signatory to collective-bargaining agreements with seven other individual electrical contractors not covered by the NECA agreement. Each of those contracts included the NECA wage rates and a most-favored-nation clause like the one in the NECA agreement.

The Respondent and the Union held their second bargaining session on October 28. Thereafter, they suspended further negotiations until the Union and NECA finished bargaining over a successor agreement to the existing NECA agreement. The Union and NECA entered into a successor agreement on December 1, and the Union immediately faxed the Respondent a summary of that agreement's terms. The new NECA agreement, a 3-year agreement, provided for a wage increase of 65 cents to $23.82 in the first year of the agreement, a 70-cent increase in the second year, and a 75-cent increase in the third year.

The Respondent and Union resumed their negotiations on December 3, and held additional bargaining sessions on December 10 and 19. At these sessions, the Union proposed to address the parties' differences over wage rates with a system that would allow the Respondent to lower its overall labor costs by using composite crews that included employees paid at a lower rate. The Respondent, however, consistently took the position that the Union's proposal was insufficient because the Respondent already used composite crews when it could.

The December 19 session was the parties' final negotiating session. On December 30, the Respondent informed the Union by letter that it believed that the parties had bargained to overall impasse because of a lack of resolution concerning four issues, including wage rates

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The parties had a collective-bargaining relationship that predated the 1996 Board certification.

[3] All dates refer to 2003, unless otherwise indicated.

[4] The Respondent sought a bargaining unit that was identical to that which the Board certified in 1996 instead of the broader unit described in the parties' expiring collective-bargaining agreement.

and the scope of the bargaining unit.[5] The Respondent stated that it would delay implementation of its final offer for ten days to give the parties a chance to try to resume bargaining.

On January 2, 2001, the Union responded as to the unit scope issue. That issue concerned whether certain foremen were to be included or excluded. The Union simply said that it "cannot insist" on the inclusion of statutory supervisors. The Respondent was confused as to whether the Union was accepting the Respondent's position that foremen are to be excluded. Accordingly, the Respondent responded by letter on January 6, 2004, that it did not understand the Union's proposal. On January 7, 2004, the Union responded to the Respondent's expressed confusion by asserting that "[t]he four (4) issues stated in your letter of December 30, 2003 have been reduced to three (3) items. (#2, 3, 4)." The Union ended its January 7 letter by inviting the Respondent to continue bargaining over those issues on which the parties had not yet agreed. On January 9, the Respondent sent a letter to the Union reiterating that it was confused about the Union's position concerning the scope of the bargaining unit. On January 12, the Union sent the Respondent a letter again inviting the Respondent to meet, but the letter did not respond to the Respondent's inquiry concerning the Union's position about the scope of the bargaining unit.

The Respondent implemented its final offer on January 12, 2004. It asserts that it did so because it had not received any concessions from the Union that would break the overall impasse.

II. THE JUDGE'S DECISION

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its final offer at a time when the parties had not bargained to impasse. With respect to wages in particular, the judge found that, although the parties had reached impasse on the issue of first-year wages, they had not done so on wages for the following years. Alternatively, the judge reasoned that, even assuming arguendo that the parties had bargained to impasse on December 30, the Union broke that impasse on January 2, 2004, by accepting the Respondent's proposal to modify the scope of the unit.

[5] The Respondent also asserted that the parties had bargained to impasse over whether applicants would be required to hold state licensing cards and whether employees would be required to submit to drug testing.

III. ANALYSIS

A. The December 30 Impasse Declaration

An employer violates Section 8(a)(5) and (1) of the Act by implementing its final bargaining proposals, without reaching a bargaining impasse. *Cotter & Co.*, 331 NLRB 787, 787–788 (2000), revd. on other grounds sub nom. *TruServ Corp. v. NLRB*, 254 F.3d 1105 (D.C. Cir. 2001), cert. denied, 534 U.S. 1130 (2002). A bargaining impasse occurs at the point in time when the parties would be warranted in believing that continued bargaining would be futile. Ibid; *Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993); *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

Although impasse over a single issue does not always create an overall bargaining impasse that privileges unilateral action, it may do so when the single issue is "of such overriding importance" to the parties that the impasse on that issue frustrates the progress of further negotiations. *Calmat Co.*, 331 NLRB 1084, 1097 (2000), and cases cited fn.49. See also *Cotter & Co.*, 331 NLRB at 787 (whether an impasse exists depends, among other things, on "the importance of the issue or issues as to which there is disagreement"). A party contending that an impasse on a single, critical issue justified its implementation of other bargaining proposals must demonstrate three things:

> [F]irst, the actual existence of a good-faith bargaining impasse; second, that the issue as to which the parties are at impasse is a critical issue; third, that the impasse on this critical issue led to a breakdown in the overall negotiations--in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved. *Calmat Co.*, 331 NLRB at 1097.

In this case, the Union conceded that the most-favored-nation clauses in the Union's other collective-bargaining agreements effectively precluded it from agreeing with the Respondent on a wage that was lower than the one in the NECA agreement. If the Union agreed to grant the Respondent a lower wage than the NECA wage, the Union would have had to offer the lower wage to 64 other electrical contractors with whom it had contractual relations. Thus, a lower contractual wage for the Respondent's small number of bargaining unit employees would have lowered the wages that hundreds of union members would earn at other local electrical contractors.

The parties' course of bargaining demonstrates that the Union never proposed a wage lower than the one in the NECA agreement, and the Respondent consistently made

clear that it would not agree to the NECA wage.[6] Although the Union made an effort to avoid an impasse by proposing an alternative means for the Respondent to lower its overall labor costs while paying the NECA rate, the Respondent responded by stating that the Union's proposal would not, in fact, sufficiently lower its overall labor costs. On these facts, the considerable gulf between the parties' wage proposals presented what proved to be an insurmountable obstacle to an agreement between the Respondent and the Union.

We do not agree with the judge that the parties failed to exhaust negotiation over wages because they had not fully discussed wages for the final 2 years of the agreement. Although the parties did not specifically discuss wages for the second and third years of the contract, we agree with the Respondent that the NECA agreement would have created an even greater obstacle to compromise on wages for the contract's second and third years, because the NECA agreement provided for additional wage increases in these years. That is, the Union had to obtain from the Respondent an even higher wage for the second and third years, in order to avoid the triggering of the "most favored nations" clause. And, since the Respondent was not willing to agree to the wages of the first year of the NECA contract, a fortiori it would not agree to NECA wages for the second and third years.[7]

The parties' course of bargaining also demonstrates that an agreement on wages was critically important to an overall agreement. The issue of wages was the most quantifiable of the issues over which the parties bargained, and it would trigger application of the most-favored-nation clauses in the Union's other collective-bargaining agreements. The suspension of negotiations between October 28 and December 3 shows that the parties understood that continued bargaining in the shadow of the concurrent NECA negotiations would be unproductive. A further demonstration of the importance of the wages in the NECA agreement is the fact that the Union faxed the Respondent a summary of the new NECA agreement immediately after the NECA negotiations concluded. That summary listed the NECA wages as the first item.

Finally, the impasse over wages led to a complete breakdown in negotiations. As in *Calmat Co*., supra, where progress on issues such as vacation and holiday leave was insufficient to break an impasse over the critical issue of a pension plan, the parties here made progress only on limited matters after the conclusion of the NECA negotiations on December 1 and before the Respondent declared impasse on December 30. These matters were the designation of an arbitral entity and the drug testing of job applicants.[8] The parties failed to make progress on other issues, including the scope of the bargaining unit, during the month of December. By the time that the Respondent declared impasse on December 30, it was reasonable to conclude that continued bargaining would be fruitless.

Our colleague makes much of the fact that the parties agreed, on December 22, to meet again on December 30. However, the issue is whether there was an impasse on December 30.[9] As discussed above, there was such an impasse on the latter date. And, as noted below, although there were exchanges after that date, those exchanges concerned unit issues, not wage issues. And, even those unit issues led to confusion, not a narrowing of differences.

[6] The dissent states, unequivocally, that "neither party presented a 'final proposal' or anything of the sort, ever." However, the Respondent's negotiator, David Simonsen, testified that he stated that its wage proposal on December 30 was its final offer. The judge did not specifically discredit this testimony. Although the Union negotiator testified that Simonsen did not use these words, the fact is that the Respondent's offer was the final one. In any event, the Board has held that the existence of impasse does not depend on whether specific words were used. Cf. *Pillowtex Corp.*, 241 NLRB 40, 46 fn. 11 (1979), enfd. 615 F.2d 917 (5th Cir. 1980) (table) ("Use of words like 'impasse' or 'deadlock'" do not necessarily indicate impasse).

[7] Simonsen's statement on October 21 that "the owners don't want to see $25 or much more than $23" further supports this conclusion. As found by the judge, the Union notified the Respondent on December 1 that the parties to the NECA contract had agreed to a 70-cent wage increase for the second year of the contract and a 75-cent increase for the third year. As the wage rate for the first year of the NECA contract was $23.82, following the terms of the NECA contract would have required the Respondent to pay a wage rate of $25.27 in the third year—a rate that the Respondent had clearly indicated was unacceptable. Thus, our dissenting colleague's statement that the Union's wage proposal "was within the ballpark communicated by the Respondent" ignores the long-term aspects of what the Union was seeking.

[8] We acknowledge Underwood's testimony that Simonsen stated that drug testing was "the most important issue" between the parties. But the notes of the December 19 bargaining session indicate that Simonsen was comparing the drug testing issue with the bargaining-unit issue, and indicating that the drug-testing issue was "more important." Other than the casual use of the words "most important" in his statement to Underwood, there is no evidence that Simonsen ever believed, or expressed to the Union, that the drug-testing issue was more important than the wage issue.

Moreover, even if the issue of drug testing was more important than the issue of wages (which it was not), it is clear that wages were important, and there is nothing to suggest that drug testing proposals would somehow make up the substantial monetary differences between the NECA wages and the Respondent's offer on wages.

[9] The Respondent did not short circuit the bargaining process or "pull the plug" on December 22 or 30. We recognize that the parties agreed on December 22 to meet on December 30. However, as of December 30, there was no change in the Union's position. Thus, it would have been pointless to have a meeting on December 30.

B. January 12 Implementation of Bargaining Proposals

An employer does not violate the Act by making unilateral changes that are reasonably comprehended within the employer's pre-impasse proposals if the employer has bargained in good faith to impasse prior to its unilateral implementation. *Taft Broadcasting Co*. 163 NLRB 475, 478 (1967), review denied sub nom. *AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). A bargaining impasse merely suspends, rather than obviates, the duty to bargain, however, and a proposal that breaks a bargaining impasse revives the parties' duty to bargain. *Airflow Research & Mfg. Corp*., 320 NLRB 861 (1996). Therefore, if the Union broke the bargaining impasse after the Respondent's December 30 declaration, the Respondent's January 12, 2004 unilateral implementation of its bargaining proposals would have been unlawful.

We disagree with the judge and our dissenting colleague that the Union broke the impasse by its response to the Respondent's proposal on the scope of the bargaining unit. The Union's letter to the Respondent of January 2, 2004, was so cryptic that the Respondent reasonably wrote back to say that it could not understand whether the Union was accepting the Respondent's position. In response to the Respondent's request that the Union clarify its position, the Union invited the Respondent to meet, but failed to provide the requested clarification. In these circumstances, we disagree with the judge and the dissent that the Union's January 2, 2004 statement about the scope of the bargaining unit was a concession. Rather, we agree with the Respondent that whether the Union had in fact made a concession, and what it consisted of, were ambiguous. The Union's statements, therefore, did not break the impasse that existed as of December 30.

Further, even if the matter of unit scope could have been clarified by subsequent bargaining, that would not have resolved the critical issue of wages.[10]

In summary, we find that the Respondent and the Union had reached a bargaining impasse by December 30 because wages were an issue of such critical and overriding importance that the parties' impasse over wages justified the Respondent's belief that further bargaining would be futile. Further, the Union did not make any concession breaking the impasse after the Respondent's December 30 declaration. Therefore, we reverse the judge, and find that the Respondent did not violate Section 8(a)(5) and (1) by implementing its final bargaining proposals on January 12.[11]

ORDER

The Complaint is dismissed in its entirety.

Dated, Washington, D.C. October 24, 2006

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Robert J. Battista, Chairman

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

It is well settled that the party asserting the existence of a bargaining impasse bears the burden of proof to demonstrate an impasse. *CalMat Co*., 331 NLRB 1084, 1097–1098 (2000). Impasse occurs when there is "no realistic possibility that continuation of discussion at the time would have been fruitful." *Sacramento Union*, 291 NLRB 552, 557 (1988), enfd. mem. sub nom. *Sierra Publishing Co. v. NLRB*, 888 F.2d 1394 (9th Cir. 1989). That standard has not been satisfied here.

The parties conducted five bargaining sessions over a 2-month period and had reached agreement on all but four subjects: (1) wages; (2) drug testing; (3) inclusion of foremen in the unit; and (4) journeymen's licenses. The majority finds that the Respondent met its evidentiary burden because the issue of wages alone deadlocked the entire bargaining process and, by itself, created a legal impasse. I disagree.

As an initial matter, there was no breakdown in the overall negotiation process—until the Respondent abruptly pulled the plug on bargaining. The parties concluded the December 19, 2003 session, which turned out to be the last session, with a promise to meet again to discuss open issues, and they agreed to set up another negotiation session for late December or early January. Indeed, on December

[10] Contrary to our dissenting colleague, even if there were a union concession on the unit-scope issue, this would not have resulted in a "significant potential cost savings" to the Respondent. The judge found that the Respondent has never employed a foreman or general foreman. Thus, any agreement to exclude foremen and general foremen from the bargaining unit would not reasonably result in any cost savings to the Respondent.

[11] In addition to finding a valid impasse on the key issue of wages, Member Schaumber further relies on the judge's finding that the parties were at impasse on the issues of unit scope and licensing. Regarding unit scope, as the judge found, the Respondent unequivocally informed the Union that it would accept nothing but contract language mirroring the certification language excluding supervisors, and the Union adamantly opposed that proposal. The Union's subsequent ambiguous "concession," such as it was, did not alter that impasse. Similarly, there was no movement on the issue of licensing. Thus, as of the date of implementation, the parties were deadlocked on virtually all of the remaining key open issues, privileging implementation of the Respondent's final offer.

22, the parties agreed to meet on December 30. If the parties were so hopelessly deadlocked with no realistic possibility that continued negotiations could be fruitful, it is counter-intuitive that they would promise to meet again shortly to discuss open issues.[1]

And there were certainly open issues. Neither party presented a "final proposal" or anything of the sort, ever.[2]

The Union had made a wage proposal that was within the ballpark communicated by the Respondent.[3] The parties had not even begun to discuss the second and third years of the contractual wage rate.[4]

The Union also had not even had a chance to respond to the Respondent's drug-testing proposal, which was not presented in detailed written form until the parties' last meeting on December 19.[5] This was the Respondent's "most important issue," as negotiator Simonsen told the Union. Therefore it is wrong to assume, as the majority implicitly does, that the Union would have been unable to make concessions on this issue that would have softened the Respondent's position on the economic issues.

The notion that a single critical issue, by itself, has created a complete breakdown in the entire negotiation process requires a finding that "there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved." *CalMat Co*., supra, 331 NLRB at 1097. The Respondent has failed to carry its burden of demonstrating that this was the situation facing the parties.

Indeed, the evidence shows the opposite. Even after the Union had proposed the NECA wage rate of $23.82 for the first year of the contract and the Respondent had presented its counteroffer of $21.50, the Respondent presented its detailed proposal on the "most important" drug testing issue, and the parties agreed to meet again to receive the Union's counter-offer on that subject.[6] Thus, it is evident that the wage issue did not preclude progress on other important aspects of the negotiation.

Finally, even under the majority's view that there was an impasse because of wages, the Union's concession on the economic issue of unit inclusion of foremen broke any impasse, because it created new and significant matters to discuss regarding the impact of that concession on the Respondent's wage costs.[7] *Beverly Farm Foundation*, 323 NLRB 787, 793 (1997), enfd. 144 F.3d 1048 (7th Cir. 1998). The majority contends that the Union's statements after December 19 regarding its current position on foremen in the unit were "cryptic" and "ambigu-

[1] The majority states that the Respondent waited for 10 days (after the December 19 session) to see if any progress could be made before declaring an impasse on December 30. This ignores the significance of the parties' agreement on December 22 to meet and bargain again. The Respondent's premature impasse declaration jettisoned the scheduled December 30 bargaining session. And, by doing so, the Respondent undermined the best way to see whether futher progress could be made. See *Taft Broadcasting*, 163 NLRB 475, 478 (1967), review denied 395 F.2d 622 (D.C. Cir. 1968) (contemporaneous understanding of the parties as to the state of negotiations relevant to whether there is an impasse).

[2] The majority contends that the judge did not discredit Simonsen's testimony that the Respondent presented a final offer to the Union on December 30. Union negotiator Underwood, however, denied that Simonsen told the Union on December 30 that the Respondent's proposal was a "final offer," and the judge credited Underwood.

[3] The Respondent initially offered to pay an hourly rate of $20.17 but, as negotiations progressed, it increased its offer to $21.50. On October 21, 2003, when the Respondent was still offering $20.17, Respondent negotiator David Simonsen told Union negotiator James Underwood that "there may be some room in there for change. They [the owners] don't want to see $25 or much more than $23." As of December 19, the Respondent had not offered in writing more than $21.50.

The Union's bargaining goal as to wages was a journeymen's rate of $23.82. That is the wage rate that the Union had negotiated with the Richmond area chapter of the National Electrical Contractors Association (NECA). To make its NECA wage proposal more acceptable to the Respondent, the Union offered incentives to the Respondent under its commercial market recovery program providing for composite crews in which newer journeymen could be hired at reduced rates and ratios established for the hiring of other journeymen and apprentices at regular rates.

[4] The majority claims that the "long term aspects" of the Union's wage proposal supports an impasse finding as to the second and third year wages of the contract. But, as the judge found, the parties never even discussed wages for the second and third years of the contract, much less reached impasse on the subject.

[5] The Respondent first proposed drug testing at the third bargaining session on December 3 and, at the fourth session on December 10, the Respondent orally explained what it wanted in such a program. In the fifth and final bargaining session on December 19, the Respondent gave the Union its first detailed proposal for drug testing procedures. The Union told the Respondent that "we would take it into consideration and we'd get back with them at the next meeting."

[6] The majority admits that the parties "made progress" on the drug-testing issue after the discussion of wages. Yet, the majority claims that this issue was a minor one—or at least not "major." That finding is wholly at odds with what the Respondent told the Union on December 19 when negotiator Simonsen characterized the drug testing issue as "most important." The majority claims that even if the issue of drug testing was more important than the issue of wages—as Underwood credibly testified regarding Simonsen's comments about the most important issue between the parties—the wage issue "would not make up" the differences between the parties. There is no evidence in the record to support that claim. Had the parties bargained beyond the early stages over "the most important issue," as they were scheduled to do, there is no telling where negotiations might have led. But, such potential progress was frustrated by the Respondent's premature impasse declaration.

[7] This issue was an economic one because the prior bargaining agreement had required premium pay for foremen and general foremen included in the contractual bargaining unit. As the judge found, the Respondent's proposal to delete references to foremen and general foremen "was strictly an economic proposal." Thus, when the Union capitulated on this issue, there was a significant potential cost savings for the Respondent.

ous" for purposes of breaking the impasse that purportedly existed. But, as the correctly judge found, the Union made it very clear that it was abandoning its former bargaining position.[8]

In short, there was much to negotiate when the parties agreed to meet again. It may well be that they eventually would have been unable to bridge the gap in their bargaining positions. But the Respondent acted prematurely when it short-circuited the bargaining process. There was no impasse when the Respondent implemented unilaterally new contract terms, and any impasse that might have existed was broken when the Union accepted the Respondent's proposal excluding foremen from the unit. Accordingly, I would find that the Respondent violated Section 8(a)(5) and (1) of the Act.

Dated, Washington, D.C. October 24, 2006

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

Thomas P. McCarthy, Esq., for the General Counsel.
David R. Simonsen Jr., Esq., of Richmond, Virginia, for the Respondent.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Richmond, Virginia, on July 26, 2004. On January 13, 2004,[1] International Brotherhood of Electrical Workers, Local 666, AFL–CIO (the Union), filed the charge in Case 5–CA–31680 against Richmond Electrical Services, Inc. (the Respondent), alleging that the Respondent had committed certain unfair labor practices under the Act. After administrative investigation of that charge, the General Counsel of the National Labor Relations Board (the Board) issued a complaint alleging that the Respondent had, in violation of Section 8(a)(5) and (1) of the Act, refused to bargain with the Union as the statutory representative of certain of the Respondent's employees.

Upon the testimony and exhibits entered at trial,[2] and after consideration of the oral arguments that counsel made at trial,[3] I enter the following findings of fact and conclusions of law.

I. JURISDICTION AND LABOR ORGANIZATION'S STATUS

The complaint alleges, and the Respondent admits, that at all material times the Respondent, a corporation with an office and place of business located in Richmond, Virginia, has been engaged in the business of electrical contracting. During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting those business operations, purchased and received goods valued in excess of $50,000 at its Richmond facility from other enterprises located within Virginia, which other enterprises had received said goods directly from suppliers located at points outside Virginia. Therefore, at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent further admits, at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

A. Background

The Respondent is a small electrical contractor, rarely employing more than 12 employees (journeymen and apprentices) at a time. The Respondent has never employed any individual as a foreman or general foreman. Keith Oley and William G. Weston are joint owners of the Respondent. For several years, ending May 27, the Respondent recognized the Union as the representative of certain of its construction industry employees.[4] The Respondent's initial recognition of the Union was pursuant to Section 8(f) of the Act. In 1996, however, the Union petitioned the Board for an election to become certified pursuant to Section 9(a) of the Act. On November 26, 1996, after conducting such an election, the Board issued a certification that the Union was the exclusive collective-bargaining representative of the employees in the following unit:

> All full-time and regular part-time Journeyman Electricians, Apprentices, Unindentured Apprentices, and Residential Wiremen employed by the Employer at its jobsites throughout the Greater Richmond-Petersburg Area, but excluding all other employees, office clerical employees, owners, guards and supervisors as defined in the Act.

[8] Thus, there is no dispute that there were four open issues. By letter of January 7, the Union told the Respondent that the four issues "have been reduced to 3 items (items #2, 3, 4)." This refers to the four enumerated issues set forth in the Respondent's letter of December 30. Item #1 in the Respondent's December 30 letter was the issue of foremen unit inclusion. On January 2, the Union already had conceded the point and agreed that "we cannot insist" any longer on the matter. When the Union specifically advised the Respondent that the foremen-inclusion issue was eliminated (item #1), and separately informed the Respondent that it no longer insisted on inclusion of the foremen in the unit, there was no mystery to be solved.

[1] All dates subsequently mentioned are between July 1, 2003, and June 30, 2004.

[2] Certain passages of the transcript have been electronically reproduced; some corrections to punctuation have been entered. Where I quote a witness who restarts an answer, and that restarting is meaningless, I sometimes eliminate without ellipses words that have become extraneous; e.g., "Doe said, I mean, he asked . . ." becomes "Doe asked . . . ." When quoting exhibits, I have retained irregular capitalization, but I have sometimes corrected certain meaningless grammatical errors rather than use "[sic]." All bracketed entries have been made by me.

[3] The parties did not submit posthearing briefs.

[4] On May 27, the Respondent laid off its last employee and ceased operations; it was not shown, however, that the corporation has been dissolved.

In 1998, the Respondent and the Union entered a 2-year agreement. At article 3.05, the 1998 contract provided for recognition and unit description:

> The Employer recognizes the Union as the exclusive representative of all its employees in performing work within the jurisdiction of the Union for the purposes of collective bargaining in respect to rates of pay, hours of employment, and other conditions of employment.

That is, the unit description of the 1998 contract did not specify any exclusions as had the Board's 1996 certification. In 2000, the parties entered another collective-bargaining agreement, effective through November 30, 2003; the 1998 contract's unit description was repeated in the 2000 contract. Although the Respondent has never employed a foreman or general foreman, the 1998 and 2000 contracts with the Union provided that foremen would be paid 8 percent above journeymen's rate and general foremen would be paid 10 percent above journeymen's rate. Those contracts further provided that, on any job that employs more than 6 journeymen, one shall be appointed foreman, and if there are more than 15 journeymen on a job, there shall be one general foreman. The prior contracts did not specify any duties, responsibilities or authorities of foremen or general foremen, other than, generally, to "supervise" the other journeymen.

The Respondent is not a member of the Richmond-area chapter of National Electrical Contractors Association (NECA), and it was referred to during the hearing as an "independent" electrical contractor. In the Richmond-Petersburg area, the Union represents employees employed by about 64 NECA members, and it represents the employees of about seven independent contractors in addition to the Respondent. As well as having a contract with the Respondent that expired on November 30, the Union had an area agreement with NECA that expired on November 30. Therefore, the Union was negotiating successor contracts with NECA and the Respondent at the same time. As discussed infra, the Union and NECA entered a successor contract on December 1.[5]

B. The 2003 Negotiations Between the Respondent and the Union

In the 2003 negotiations for a successor agreement to the 2000 contract, the Respondent was represented by David R. Simonsen Jr., Esq. Simonsen also was the Respondent's only representative at trial, and he appeared as the Respondent's only witness, questioning himself. Also, in presenting the prima facie case, counsel for the General Counsel questioned Simonsen pursuant to Rule 611(c). The Union was chiefly represented in the negotiations by James Underwood, its business manager and chief official. At trial, Underwood was the General Counsel's only witness in addition to Simonsen.

The 2003 negotiations began in August with an exchange of written proposals. By a mailing of August 22, Underwood submitted to Oley an extensive proposal, generally following the section-numbering system of the 2000 contract. The Union's initial proposal was for a 1-year agreement. For the journeymen's hourly wage rate, the Union proposed $25.17.[6] The journeymen's rate for the last year of the 2000 contract had been $23.17.

The 2000 contract had provided for arbitration of grievances by Arbitration Associates. The Union's August 22 proposal included provisions for binding arbitration by the Council of Industrial Relations for the Electrical Contracting Industry (which was referred to in the hearing, and referred to in relevant correspondence, as the CIR). Another of the Union's proposals was to eliminate the following clause that had been contained in the 2000 contract:

> The Union agrees that if, during the life of this Agreement, it grants to any other Employer in the Electrical Contracting industry on work covered by this Agreement[] any better terms or conditions than those set forth in this Agreement, any [such] better terms or conditions shall be made available to the Employer under this Agreement, and the Union shall immediately notify the Employer of any such concessions.

This provision, a most-favored-nations clause,[7] had also been contained in the last NECA contract, and it was continued in a successor contract which the Union and NECA entered on December 1.

By a mailing of September 10, Simonsen submitted to Underwood a proposal that called for 14 numbered changes to the 2000 contract. The three most significant of these changes were: (1) Article four of the 2000 contract, "Referral Procedure," had not required that Union-referred applicants (applicants) have Virginia licenses (or "cards," as the parties sometimes called state licenses). The Respondent's September 10 proposal was that all applicants have Virginia licenses; (2) The 2000 contract had had no provisions for drug testing of current employees or applicants. The Respondent's September 10 proposal did not propose specific language for a drug testing program, but it did state "Article IV—Add new section— Drug-testing results [to be] presented along with referral from Union. Testing to be at Union's or prospective employee's expense." Theretofore, neither the Respondent nor the Union had possessed or maintained any drug-testing facilities or procedures; (3) The Respondent proposed to reduce the journeymen's wage rate from $23.17 to $20.17 per hour. As did the Union, the Respondent proposed a 1-year agreement.

The parties first met for bargaining on October 21. Accompanying Underwood were: Bubba Gillend, a union business agent, and Local members Ronnie Smith, Omar Rafey, and Kendra Logan. Logan served as the Union's notetaker.[8] Simonsen appeared at the bargaining session without accompaniment.

[5] The 2003 contract between the Union and NECA also was not placed in evidence.

[6] All wage rates subsequently mentioned are on an hourly basis.

[7] Quoting from Roberts, *Dictionary of Industrial Relations* (1966), at 259, a most-favored-nations or more-favorable-terms clause is an agreement by which a union "agrees that it will not sign contracts with other employers under more favorable terms. . . . [T]he language of the agreement may be automatic; that is, if conditions more favorable are granted to a competitor, then the more favorable conditions automatically apply to the signatory company."

[8] Recitals of who attended the bargaining sessions are taken from Logan's notes.

Simonsen submitted a proposal which was introduced by a "Summary of Key Proposals," which summary included:

> Bargaining Unit: RES proposes, and will insist on, adoption of the language of the formal Certification, issued November 26, 1996, for purposes of defining the contractual bargaining unit. Among other things, RES will not agree to include statutory supervisors in the recognized bargaining unit. In the opinion of RES, "General Foremen" by practice and custom clearly are statutory supervisors. "Foremen" may or may not be statutory supervisors, depending on what they actually do; the law is unclear in RES' opinion. RES desires use of the terminology "Working Foremen" to describe those foremen who are not statutory supervisors. Beyond the Certification, this is a permissive subject of bargaining and it is RES' understanding that the Local cannot insist to impasse on any different definition of the bargaining unit than that found in the Certification.

As Article 3.05, the Respondent's October 21 proposal repeated the certification's unit description and added: "Note: This is the exact language of the Certification issued by Region 5 on November 26, 1996. RES does not agree to any change in the Certification." The Respondent further proposed to delete all sections of the 2000 contract that had referred to foremen or general foremen.

In its October 21 submission, the Respondent continued to propose that applicants have Virginia licenses. As a new Article 4.20, the Respondent proposed: "The Union shall require applicants to take and pass a drug test before referring such applicants to the Employer, pursuant to a reasonable and appropriate drug-testing program."

Article 5.12 of the 2000 contract had provided wage premiums for those journeymen who were designated as foremen or general foremen (after 6 or 15 journeymen were hired on a job, as noted above). The Respondent continued to propose to delete those provisions and added:

> Note. Supervisors are not part of the certified bargaining unit. General Formen clearly are statutory supervisors. The situation with regard to Foremen is unclear. As noted above, RES will accept language referring to a "Working Foreman." Beyond that, RES will not agree.

Article 5.15(a) of the 2000 contract had generally provided that pre-employment physical examinations were prohibited and that subsequent physicals were allowed only to test for the presence of communicable diseases. The Respondent's October 21 proposal included:

> 5.15(a): Change to provide that Employer may implement reasonable drug-testing program that permits testing on basis of reasonable suspicion and also permits Employer's compliance with any drug-testing program required by owner of job site.

Underwood testified, without contradiction, that during the October 21 bargaining session he told Simonsen of the Union's Commercial Market Recovery Program, a program that the IBEW was developing to allow smaller contractors to hire newer journeymen at reduced rates, as long as full-scale journeymen are used in negotiated ratios on jobs and apprenticeship programs are honored. Such "composite crew" programs, of course, could reduce an employer's labor costs. Underwood identified a form for such a program that he tendered to Simonsen, but the form (entitled "Standard Intermediate Journeyman Addendum") had only blanks where proposed percentages of journeymen's wage rates were to be entered. Underwood further testified that Simonsen stated that such a program could be useful and that the Respondent would consider it. Simonsen testified that, while the Respondent was interested in any proposal that would have lowered overall costs, the Union's proposals for reduced rates for newer journeymen were based on percentages of the experienced journeymen's wage rate, and it was that rate that the Respondent desired to reduce, but the Union was proposing only to increase that rate to whatever the parties to the NECA negotiations ultimately agreed to.

Without objection, the General Counsel placed Logan's notes of the bargaining sessions that she attended[9] into evidence. Simonsen did not contradict the factual representations of any of Logan's notes, although he did testify that more was said than the notes indicate.[10] According to Logan's notes of the October 21 bargaining session, Simonsen stated that the Respondent was "asking for $20.17, and there may be some room in there for change. They don't want to see 25 or much more than 23." By "they," Simonsen was referring to the Respondent's owners, Oley and Weston, whom Simonsen said "can't compete with NECA contractors." Logan's notes further indicate that Simonsen said that there was "a problem" with the "favored nations in NECA's contract" because it helped only the larger contractors. Underwood responded that the Union was trying to get rid of the clause in the NECA negotiations.

Present for the Union at a bargaining session on October 28 were Underwood, Logan, and Rafey; present for the Respondent were Simonsen and Weston. Logan's notes indicate that Underwood told Simonsen that the Union could not agree to change the unit description as the Respondent wanted because, in the Union's attorney's opinion, general foremen were not statutory supervisors. The parties repeated their positions on the possibilities of saving the Respondent some labor costs under the Commercial Market Recovery Program and other such programs. (Underwood pointed out that the Respondent had twice taken advantage of such programs in the past.) Logan's notes indicate that Simonsen suggested that the parties suspend negotiations until the Union finished its concurrent negotiations with NECA; Underwood agreed.

On November 30, both the 2000 contract and the Union's last agreement with NECA expired. On December 1, Underwood faxed to Simonsen a "term sheet" which was the product of the Union's negotiations with NECA for a successor contract. The listed changes indicate that the 2003 NECA agreement was for 3 years; the parties had agreed to a 65-cent wage

[9] As discussed infra, the parties are in disagreement about whether a bargaining session occurred on December 30. If there was such a bargaining session, Logan did not attend.

[10] Underwood acknowledged that, when he said during negotiations that something was to be "off the record," Logan would stop taking notes. The transcript, p. 151, L. 22, is corrected to change "No" to "Yes."

increase, to $23.82, for journeymen on December 1, 2003, a 70-cent increase on December 1, 2004, and a 75-cent increase on December 1, 2005. The term sheet further reflected that the Union and NECA had agreed to "include electrical industry model substance abuse program." There was no cover letter for Underwood's December 1 fax of the NECA negotiation's term sheet; Underwood testified that, by faxing the term sheet to the Respondent, he was letting it know "that we were trying to negotiate that $23.82" that was specified as the journeymen's wage rate for the first year of the 2003 NECA contract for the Richmond areas. The term sheet did not indicate that NECA and the Union had agreed to any changes from the most-favored-nations clause of their prior contract.

Present for the Union at a bargaining session on December 3 were Underwood, Logan, and Smith; present for the Respondent were Simonsen and Weston. Underwood testified that at this meeting Simonsen stated that the Respondent wished to implement a drug testing program. Underwood testified that he responded that the Union was not opposed to drug testing but wanted "some protection for the existing employees." Logan's notes indicate that Underwood told Simonsen that the Union was then negotiating a drug testing program with NECA but NECA was taking the firm position that it would not allow independent contractors to participate in a trust that was being created to finance the operation of the program. Underwood and Simonsen further discussed an arbitration body for the successor contract's effective period; Underwood wished to use CIR; Simonsen rejected that proposal, stating that CIR was a functionary of NECA and the Union and was not fair to independent contractors such as the Respondent. Retaining Arbitration Associates was discussed as a possible alternative, but neither negotiator spoke favorably of the idea, and no agreement was reached on arbitration.

Present for the Union at a December 10 bargaining session were Underwood, Logan, and Smith; present for the Respondent were Simonsen, Weston, and Oley. Simonsen and Underwood signed an agreement that extended the 2000 contract from December 1 through December 31, except that the wage rate for journeymen during that month would be equal to the first-year rate of the 2003 NECA contract, $23.82. At the December 10 bargaining session, the Respondent submitted proposals that were introduced with the statement that included:

> RES understands that notwithstanding any initial proposals, and with certain exceptions such as an exception of the drug-testing Trust, the Union is now proposing to RES the terms and conditions of the contract that the Union has with NECA.

After that, Simonsen stated that the Respondent would therefore use the NECA terms "as a starting point." Then, in another "Summary of Key Proposals," the Respondent listed seven changes that it proposed to the NECA agreement. That summary included:

> Bargaining Unit: RES will not agree to any unit definition different than the language of the formal Certification, issued November 26, 1996, for purposes of defining the contractual bargaining unit.

The summary went on to state that the Respondent would agree to a 3-year contract, as had been recently proposed by the Union. The summary then stated that, for the first year of the successor contract, the Respondent was proposing to reduce journeymen's wages (again, from the last rate of the 2000 contract of $23.17) to $21.50, rather than to $20.17 as the Respondent had been proposing since September 10. The summary also proposed using Arbitration Associates, AAA or FMCS as sources of arbitrators, but stated flatly that the Respondent was unwilling to agree to continue using CIR as the Union had proposed.[11] The Respondent's December 10 summary also proposed to allow it to implement a drug testing program for all applicants and employees.

Additionally, the Respondent continued to propose on December 10 that all referred applicants have Virginia licenses and that all references to "foreman" and "general foreman" be deleted in the successor contract. The Respondent proposed that "On all jobs employing six (6) or more Journeymen, one (1) Journeyman shall be designated as a 'Working Foreman' and shall cease any sustained work with his tools."[12] The Respondent further continued to propose that it have the right to implement a drug testing program that permits it to test employees "on basis of reasonable suspicion and also permits Employer's compliance with any other drug-testing program required by owner of job site." Simonsen admitted that during the December 10 meeting he told Underwood that, if the Union would not agree to any drug testing, the parties were at impasse. Logan's notes indicate that Underwood asked Simonsen to "get me a copy of the drug program you want" before the next meeting. Simonsen agreed to do so.

Underwood testified that, as of December 10, the Union was still attempting to formulate a drug testing program that it could propose to independent contractors (because, again, independent contractors were being excluded from participating in the trust that the Union and NECA were in the process of establishing to conduct drug testing). Logan's notes indicate that Underwood asked Simonsen what kind of drug testing program the Respondent was seeking; Simonsen replied that the Respondent wanted a program that provided for preemployment testing and for testing when there was a reasonable suspicion that an accident had been caused by an employee's being under the influence of drugs. To the Respondent's proposals that applicants have Virginia licenses, Underwood stated that employers always had a right to demand that applicants have a license and it was therefore unnecessary to include such a provision in the contract.

Present for the Union at a December 19 bargaining session were Underwood, Logan, Smith, and Rafey; only Simonsen appeared for the Respondent. At this meeting, the parties agreed that the successor contract would be for a 3-year period and that the American Arbitration Association would be the source of arbitrators during that period. The Respondent's submissions of December 19 repeated its last proposal for a journeymen's wage rate, $21.50. The Respondent repeated its proposal on the bargaining unit description ("RES will not agree to

[11] The Respondent's arbitration proposal concluded: "If the Union will not agree to any arbitrator but CIR, then the parties are at impasse on this issue."

[12] The Respondent further proposed that any working foreman have a Virginia license.

any unit definition different than the language of the formal Certification. . . ."), and the Respondent added: "RES desires use of the terminology "Working Foremen" to describe those foremen who are not statutory supervisors." The Respondent added to its proposal that the Union refer only journeymen who have Virginia licenses a statement that "This may be current practice, but RES wants explicit contract language."

The Respondent's December 19 submission concluded with the Respondent's first detailed proposal for drug testing procedures. Underwood testified that he went over the proposal with Simonsen, discussing different points. (For example, Underwood recalled telling Simonsen that a $500 property damage threshold for requiring a test was too low.) Underwood testified that he told Simonsen "[t]hat we would take it into consideration and we'd get back with them at the next meeting" and that Simonsen told the Union that drug testing was "the most important issue" between the parties. Also, Logan's notes for the December 19 meeting state that Simonsen told the Union: "The bargaining unit thing is kind of legal and technical. The more important issue is drug testing." In his testimony, Simonsen acknowledged that Underwood stated that, although the Union was not opposed to drug testing in principle, it at least wanted provisions for rehabilitation of employees (nonapplicants) who failed a drug testing or retesting. Underwood testified that the December 19 meeting ended by agreement that he and Simonsen would contact each other "and set up another negotiation meeting sometime late December, early January" and with Simonsen's asking him to get back to the Respondent with a drug testing proposal "so they could look at it." This testimony by Underwood is corroborated by Logan's notes; it was not disputed by Simonsen; and I found it credible.

Underwood testified that on December 22 he called Simonsen and they agreed to meet on December 30. Underwood further testified that on December 30 he called Simonsen to confirm that they were meeting on that date, but Simonsen replied that the meeting was "off" because the parties were at impasse on the "sticking points" of "[s]tatutory supervisors, foremen, general foremen, wages, the drug-testing issue,[13] and state cards." Underwood further testified that he suggested federal mediation, but Simonsen replied that "they weren't interested in mediation."

Underwood further identified a letter that Simonsen faxed to him later on December 30; the letter states:

> This letter confirms our conversation this morning in which I informed you that Richmond Electrical Services, Inc. (RES) is declaring an impasse in the negotiations and intends to implement its last offer on January 1, 2004.
>
> As we see it, the simple truth is that, because of the MFN language of the NECA agreement to which Local 666 is a party, Local 666 can only offer, and has only offered, RES the terms and conditions of the NECA contract. RES, however, has no desire or willingness to enter into a NECA pattern agreement. Therefore, even before we get into any of the particulars, we seem to be at an impasse in terms of our basic approaches to the negotiations.

Simonsen then listed the "four key issues" between the parties and stated why he felt the parties were at impasse on those issues.[14] (1) About the issue of including statutory supervisors in the unit description, Simonsen stated that the Respondent was insisting on the 1996 certification's unit description but the Union was not agreeing to "forego the past agreement to include General Foremen and Foremen in the agreed bargaining unit, even when such individuals may be statutory supervisors." (2) About the issue of wages, Simonsen stated that the Respondent was offering only $21.50 but the Union was insisting on "the current NECA agreement of $23.82 (first year)." (3) About the issue of license requirements, Simonsen stated that the Respondent was insisting on an express provision that all Union-referred journeymen have Virginia licenses but the Union was insisting that such language was not necessary because that had always been the practice.(4) About the issue of drug-testing, Simonsen stated that "RES has proposed the establishment of a reasonable drug-testing program. . . . Although Local 666 has indicated a willingness to discuss a program, it appears that we are currently at an impasse in such discussions." As a further issue between the parties (which Simonsen numbered "2A") Simonsen stated that, although the Respondent was willing to maintain the same structure of the 2000 contract that tied certain benefits to the journeymen's wage rate, "RES has refused to accept proposed increases such as the doubling of the contribution to the apprenticeship program." (Although the above-quoted preface to Simonsen's December 30 letter had declared that the Respondent would implement its last proposal on January 1, it did not do so, as discussed below, until January 12.)

By letter dated January 2, Underwood responded to Simonsen's December 30 letter.[15] (1) In regard to the issue of statutory supervisors, Underwood stated that "we cannot insist on their inclusion," but the Respondent should understand that it "cannot hire supervisors through our referral system." (2) In regard to the issue of journeymen's wage rate, Underwood stated that the Union was maintaining its position because "Local 666 has an established rate of $23.82 from over 65 electrical contractors, both NECA and independents." Underwood argued, however, that "with the ratio given in the last negotiations," an overall effective rate of even less than $21.50 could be negotiated. (Underwood testified that he was here referring to the Union's programs that could reduce the Respondent's overall labor costs on some jobs.) (2A) Underwood argued that the Union's proposed increase in the apprenticeship program contribution rates was less than 1/2 of 1 percent. (3) Underwood stated that language requiring journeymen to have Virginia licenses "does not need to be included" in the collective-bargaining agreement because "this policy has always been honored." (4) Underwood stated that "Local 666 is not opposed to drug testing, but we must be assured that our members employed by RES have an Employee Assistance Program that goes along with the drug-testing." Underwood concluded his

[13] The transcript, p. 108, L. 9 is corrected to change "prevent" to "present."

[14] This paragraph's internal numbering system, which was referred to in later correspondence between Simonsen and Underwood, was Simonsen's.

[15] Underwood did not number his responses; I inject the numbers, following Simonsen's system, to make comparisons easier.

January 2 letter by stating that he was notifying FMCS "to make their services available in mediating our differences."

By letter dated January 6, Simonsen responded to Underwood that the Respondent believed that the parties had been at impasse since December 19 and that: "The major point on which our belief in this regard is based on the fact that the Union only can offer us the NECA pattern contract (without participation in the drug-testing provision) and nothing else." Simonsen further stated:

> The Company remains ready, willing and able to continue in a relationship with the Union. In our view, the real question has been whether or not the Union is ready, willing and able to have a relationship with the Company that is truly "independent" of the Union's relationship with NECA. As you know, the Company believes that the answer to that question is no, primarily because of the MFN language of the NECA contract. The Union simply cannot negotiate with the Company as an independent entity.

Simonsen concluded the letter by stating that "The Company and the Union are at impasse on a new agreement and the Company is going forward."

By letter dated January 7, Underwood informed Simonsen that: "The four (4) issues stated by your letter of December 30, 2003, have been reduced to 3 items (#2, 3, 4)." Underwood concluded by stating that FMCS had contacted him about mediating the dispute, and: "I will be glad to meet at your earliest convenience to negotiate the three (3) remaining items."

In passages of the correspondence that I have not mentioned before, and in a grievance, the Union claimed that the Respondent was required by "cooling off" provisions of the 2000 contract to refrain from changing terms and conditions of employment for the first 10 days of 2004. The Respondent ultimately agreed, and it delayed implementing its last proposal until January 12. On that date, it reduced the wages of the journeymen whom it employed to $21.50, and it reduced its contributions to the pension and other funds commensurately.[16] The Respondent continued those reductions until May when it restored the journeymen to the last rate of the expired 2000 contract, $23.17.

Simonsen testified that during the December 3 and 10 bargaining sessions Underwood "said that he could not agree in the negotiations with Richmond Electrical Services to any inside journeyman wireman wage rate that is the benchmark rate for the contract, less or more, that is different than the $23.82, first year." Simonsen further testified that at the December 3 bargaining session Underwood said that, while he agreed in principle with drug-testing, he could not agree with any details "until he had an agreement with NECA" on drug testing because, if he did, he would thereby "show his hand" to NECA.

Simonsen further testified that his first December 30 declaration of impasse was made at a face-to-face bargaining session on that date, not in a telephone conversation as Underwood had testified. Simonsen testified that he met with Underwood, alone, at Underwood's office. Simonsen asked himself, and Simonsen testified:

> Q. Question. The December 30th meeting—was impasse implementation discussed across the table?
>
> A. Answer. Yes. At the December 30 meeting, I explained to Mr. Underwood that I felt given where we were after a conversation on December 30, we were at impasse. And I saw no point in continuing discussions.[17] ...
>
> Q. BY MR. SIMONSEN: Question. At the December 30 meeting, you told Mr. Underwood you were going to declare impasse and implement. Did Mr. Underwood indicate any ability to offer any new proposals?
>
> A. Answer. No.
>
> Q. Question. On December 30th, did you tell Mr. Underwood that you considered Richmond Electrical Services' position as stated the final best offer.
>
> A. Answer. Yes.

Underwood testified that, if he had been meeting with Simonsen in a bargaining session on December 30, other members of the Union's bargaining committee would have been there. Underwood further testified, without objection, that the Union's records reflect that no member was given pay for attending a negotiation meeting on that date. On rebuttal, Underwood denied that on December 30 he told Simonsen that the Union could not move on any issues that were in dispute.[18] Underwood further denied that he told Simonsen, on December 3 "or [in] any subsequent session" that he could not agree to any details of a drug testing program. And Underwood denied that, on December 30, Simonsen told him that what the Respondent had proposed was its final offer.

On cross-examination, Underwood was asked and he testified:

> Q. Mr. Underwood, did you ever tell me that you could give a wage rate for the inside journeyman in our negotiations less than what you'd agreed with NECA?
>
> A. I think that we had some conversation with that. And I don't believe I ever told you, no, sir. ...
>
> Q. Does it [the MFN clause in the NECA agreement] not limit your ability to bargain with Richmond Electrical Services that if you grant a more favorable term to Richmond Electrical Services than you have to the other 99 percent of your total bargaining units, you've got to give it to everybody?
>
> A. That's, yes, that's true.

Underwood further admitted that, by force of the most-favored-nations clause of the contract that the Union had recently negotiated with NECA, if the Union had agreed with the Respondent to a first-year journeymen's wage rate of less than $23.82, the Union would have lost a probable grievance that NECA would have filed and the Union would have been required to go back and agree to reduce the journeymen's wage rate for each of the NECA contractors. On redirect examination, however, the

[16] On January 12 through 15, Simonsen and Underwood engaged in further correspondence regarding the issue of excluding supervisors from the unit description; Underwood initially wavered from his January 2 position, but he quickly returned and agreed that supervisors would be excluded from the unit description.

[17] The transcript, p. 195, L. 4, is corrected to change "discussing" to "discussions."

[18] The transcript, p. 201, L. 2, is corrected to change "employees" to "issues."

General Counsel asked Underwood if he could have varied from the terms of the NECA contract. Underwood replied that he could have; he then volunteered that the Union had agreed to an arbitration clause with Master Electric, another independent contractor, which clause was different from the clause in the NECA contract. Under further questioning, however, Underwood acknowledged that the Union had never agreed with other independent contractor to a wage rate of less than what the NECA contract had called for.

III. CREDIBILITY RESOLUTIONS AND CONCLUSIONS

An employer violates its duty to bargain if, when negotiations are sought or are in progress, it unilaterally institutes changes in existing terms and condition of employment. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The principal exception to this rule occurs when the negotiations reach an overall impasse, not just an impasse on some of the issues between the parties. When an overall impasse occurs, the employer is free to suspend meeting with the representative of its employees until some act or event "breaks" the impasse.[19] And the employer is also free upon impasse to implement changes in employment terms unilaterally so long as the changes have been previously offered to the Union during bargaining.[20] Impasse being a defense to the allegation of unlawful unilateral actions, it must be proved by the party asserting it—in this case the Respondent.[21] Some of the relevant factors used to determine whether an impasse exists are "the parties' bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), affd. sub nom. *AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). Another factor that is considered is the parties' demonstrated flexibility and willingness to compromise in an effort to reach agreement. See, e.g., *Wycoff Steel*, 303 NLRB 517, 523 (1991). After considering all of these factors, the Board will still not find that an impasse existed at a given time unless there is "no realistic possibility that continuation of discussion at that time would have been fruitful." *AFTRA v. NLRB*, 395 F.2d at 628.

The ultimate issue is whether an overall impasse existed at the time that the Respondent implemented its last offer on January 12. Simonsen testified that in the meetings of December 3 and 10 Underwood stated that the Union would not agree to a first-year-of-contract's journeymen's wage rate other than that to which the parties to the NECA negotiations had agreed, $23.82. That testimony was credible; moreover, Underwood essentially admitted that he was bound by the most-favored-nations clause of the NECA agreement and that he could not agree with the Respondent to a first-year wage rate of less than $23.82. Also, in his January 2 letter, Underwood acknowledged that the Union was demanding no less than the NECA first-year rate because "Local 666 has an established rate of $23.82 from over 65 electrical contractors, both NECA and independents." This is an express admission that the Union was not negotiating in good faith on the issue of the successor contract's first-year journeymen's wage rate. An implied admission is also found in the fact that Underwood never responded to Simonsen's repeated statements that the Union was demanding no less than $23.82 because of the most-favored-nations clause in the NECA contract. Moreover, although Underwood testified that Simonsen had said at the October 21 bargaining session that the Respondent did not "want to see . . . much more than $23," thereby indicating that it would at least consider a journeymen's wage rate between $23 and $23.49, the Union never proposed anything other than $23.82, the NECA figure. Although the Union offered potential savings under its Commercial Market Recovery Program, or other programs, it was unwilling to budge on the hourly rate for journeymen, which rate determined the Respondent's liability for fund contributions (and had determined wages of foremen and general foremen). Finally, to demonstrate that the Union was negotiating in good faith with the Respondent on wages, notwithstanding the most-favored-nations clause in the 2003 NECA contract, Underwood testified that the Union had agreed with another independent contractor to an arbitration clause that was different from that which was contained in the 2003 NECA contract. Nevertheless, an arbitration clause is not necessarily "better" because it is different; a lower wage rate, however, is indisputably "better" for an employer, and Underwood admitted that, by agreeing to a lower first-year wage rate with the Respondent, he would have been inviting a grievance which he assuredly would have lost. Therefore, on January 12, the parties were deadlocked on the issue of journeymen's wages during the first year of any contract to which they may have ultimately agreed. And they were deadlocked because the Union was not, and could not have been, bargaining in good faith on the issue because it was bound by the most-favored-nations clause of the contract that it had with NECA.

Simonsen was further credible in his testimony that at the December 3 bargaining session Underwood told him that the Union could not agree with the Respondent on any drug testing issues because drug testing was still being negotiated with NECA and he did not wish to "show his hand" by reaching agreements on that issue with the Respondent. Nevertheless, by December 3 the Respondent had not presented a drug-testing program, and at that point Underwood's comment that he could not agree to any program except the then-being-negotiated NECA program was no more than tactical, and Simonsen necessarily would have understood it as such. Moreover, Underwood effectively withdrew that comment when, on December 19, he reviewed with Simonsen the Respondent's first detailed proposal on drug testing and, at the suggestion of Simonsen, promised to return with proposals on the issue. That the Union was not persisting after December 19 in any refusal to consider drug testing that NECA had not agreed to is further apparent by what is obviously missing from Simonsen's December 30 letter. In that letter, Simonsen at least briefly recited what the Union wanted that the Respondent could not agree to in regard to the three other issues that were in dispute between the parties (the Union wanted NECA first-year wages; the Union was refusing to put license requirements in the contract; the Union

[19] As stated in *McClatchy Newspapers, Inc.*, 321 NLRB 1386, 1389 (1996), "When an impasse in bargaining is reached, the duty to bargain is not terminated but only suspended."

[20] *Huck Mfg. Co.* v. NLRB, 693 F.2d 1176, 1186 (5th Cir. 1982), and cases cited therein.

[21] *Sacramento Union*, 291 NLRB 552, 556 (1988).

was not agreeing to exclude statutory supervisors from the unit description). Tellingly, however, Simonsen does not say what the Union wanted on drug-testing that the Respondent could not agree to. Simonsen stated no more than: "Although Local 666 has indicated a willingness to discuss a [drug-testing] program, it appears that we are currently at an impasse in such discussions." If at the December 19 meeting Underwood had persisted in stating that he could only agree to whatever the NECA negotiations ultimately provided on drug-testing, Simonsen assuredly would have forthrightly said so in his December 30 letter and not rested on such a transparency as the statement that "it appears" that the parties cannot agree. Simonsen could not state in his December 30 letter where the disagreement was because at the December 19 bargaining session he had asked the Union to return to the parties' next bargaining session with a drug-testing proposal; then Simonsen peremptorily canceled the December 30 meeting before Underwood could either give such a proposal or explain why he could not do so. I therefore find that, at the end of the December 19 session, the parties were not at impasse on the issue of drug testing.

Although at the December 19 bargaining session the Union continued to demand the NECA-negotiated first-year journeymen's wage rate of $23.82, the parties did not even discuss what the journeymen's wage rates for the following years of the newly agreed 3-year term might be. Therefore, as well as drug testing, it is clear that the parties were not deadlocked on the issues of second- and third-year wages at the end of the December 19 bargaining session.

I do find and conclude, however, that at the end of the December 19 bargaining session the parties were deadlocked, and legitimately so, on the issues of whether to continue in the successor contract the 2000 contract's references to foremen and general foremen and whether a successor contract would cover statutory supervisors. The 2000 contract had provided that when more than 6 journeymen were on a job, one would be made a foreman and paid a premium of 8 percent above the journeymen's wage rate; and the 2000 contract provided that if there were 15 or more journeymen on a job, one would be made a general foreman and paid a premium of 10 percent above the journeymen's rate. Therefore, the Respondent's proposal to delete references to foremen and general foremen was strictly an economic proposal. The Union was proposing that, if enough journeymen were hired, one or more of them would be paid premium rates, and the Respondent was proposing that, during the period of the successor contract, no premium be given to one journeyman simply because certain numbers of other journeymen have been hired. This economic conflict is the essence of bargaining, and the position of neither the Respondent nor the Union can be said to have been taken in bad faith.

I further conclude that the Respondent could lawfully, as it did, insist to the point of deadlock, or impasse, on the issue of excluding statutory supervisors from the unit description of the successor contract. The General Counsel contends that the Respondent did not have a right to so insist because the Respondent had agreed, in the two contracts that succeeded the 1996 certification, to include supervisors in the unit description. Because of that, the General Counsel argues, the Respondent could request, but not insist upon, a modification of the agreed-upon unit description; and if the Union did not agree, the General Counsel further argues, the Respondent's only recourse was to file a unit clarification petition with the Board. The Respondent contends that, because it was not seeking a midterm modification of the 2000 contract, it had a right to press to the point of impasse its demand to exclude statutory supervisors from any unit description.

The General Counsel bases his position on certain language of the administrative law judge in *Frontier Hotel & Casino*, 318 NLRB 857, 868, 872 (1995), enfd. in relevant part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997). In that case, the employer contended, inter alia, that it was excused from all bargaining obligations because the unit description of its predecessor's contract, and the appropriate unit as alleged in the complaint, included statutory supervisors. The administrative law judge found that the employer had committed numerous outrageous acts in dereliction of its duty to bargain. As he did so, the judge also commented that a unit that includes supervisors, once agreed upon, can be modified to exclude them only by agreement of the other party or by the successful filing with the Board of a unit clarification petition. The Board affirmed the judge's findings of overwhelming evidence of an overall refusal to bargain, but it did not expressly pass upon the judge's comments about the defense that was based on the previous inclusions of supervisors in the unit description. Rather, at its footnote 11 the Board affirmed the administrative law judge's complete rejection of that defense as "irrelevant to refusal-to-bargain allegations." In this case, the Respondent does not seek to escape all bargaining obligations with the Union; it seeks only to be excused from bargaining over the terms and conditions of employment of individuals who are subsequently employed as statutory supervisors. Therefore, even if Unbelievable, Inc., can be read as an approval of the dictum of the administrative law judge, it would not bear on this case.[22]

The law that controls this case, rather, was concisely stated by Judge Jay R. Pollack in *McClatchy Newspapers*, 307 NLRB 773 (1992), where the employer also withdrew recognition for supervisors during negotiations for a successor contract:

> In *Newspaper Printing Corp*., 232 NLRB 291, 292 (1977), enfd. 625 F.2d 956 (10th Cir. 1980), cert. denied 450 U.S. 911 (1981), the Board found, inter alia, that an employer cannot lawfully insist to impasse on a modification of an existing bargaining unit description because the definition of an existing bargaining unit is not a mandatory subject of bargaining. The parties are free however to define their own lawful bargaining units by voluntary agreement. Thus, statutory supervisors may be included in a bargaining unit by mutual agreement. It should follow that once the contract expires, neither party is obligated to

[22] Moreover, it is to be noted that the language of the administrative law judge's decision in *Unbelievable, Inc.*, cites only *New York Times Co.*, 270 NLRB 1267, 1273 (1984), a case that involved a mid-term refusal to furnish information about employees whose unit placement was not disputed, not bargaining for a successor contract, which is the case here.

> include the statutory supervisors in the succeeding agreement. Cf. *Salt River Valley Assn.*, supra, [204 NLRB 83 (1973), enfd. 498 F.2d 393 (9th Cir. 1974)] where a violation was found because the employees excluded from the unit by the employer were found not to be statutory supervisors. Presumably had the employer been correct that the excluded employees were supervisors, then no violation would have been found in the employer's refusal to include them in the bargaining unit.

The Board agreed with the holding of Judge Pollack by stating: "We agree with the judge that because the Respondent's press operators are statutory supervisors the Respondent did not violate the Act by removing them from the bargaining unit on June 22, 1988 [the date the employer implemented its last proposal]." Therefore, the Respondent had the right to insist in successor contract negotiations that statutory supervisors must be excluded from the unit description, even though they had previously been included.[23]

In summary, at the end of the December 19 bargaining session, the parties were validly stalemated on the issues of unit description and state licenses for journeymen, but they had not reached stalemate, or impasse, on the issues of drug testing and wages for the second and third years of a 3-year successor contract. Also, it was at the December 19 session that the parties agreed that a successor contract should be for a 3-year period, and it was at that session that they further agreed that the American Arbitration Association would be their source of arbitrators during the period of the successor contract. These were agreements on issues that were important to the parties, and their accomplishment substantially detracts from any contention that the parties would have been unable to make further agreements if the bargaining had been allowed to continue. Moreover, the issue of drug testing, on which the parties had not reached impasse on December 19, was characterized by Simonsen as even more important than the unit description dispute. And the issue of the unit description, itself, could hardly have been of more importance to the parties because its resolution would determine whom the Union would represent in the future.[24] At minimum, the parties had not, on December 19, explored any facet of rehabilitation of those who failed a drug test, a legitimate concern that had been expressed by the Union.

Underwood testified that on December 30 he telephoned Simonsen to confirm their meeting of that date and that, when he did so, Simonsen declared impasse after listing the four principal issues between the parties (supervisors, wages, licenses, and drug testing). Simonsen, however, testified that the men met face-to-face on December 30 and it was then that he declared impasse "after a conversation" in which the four principal issues between the parties were discussed. Although at points on cross-examination Underwood couched his testimony in terms of an inability to recall if he met with Simonsen on December 30, he was clear on direct examination, and rebuttal, that his only discussion that date with Simonsen was on the telephone. And Underwood was credible in that testimony. Moreover, Simonsen's December 30 letter relating the declaration is couched in terms of "our conversation this morning." Simonsen is an experienced labor lawyer and negotiator. If there had actually been a bargaining session that was of the pivotal importance to the defense that the Respondent was clearly planning to make it, he reasonably would have referred to a "bargaining session" as such if one had occurred; he would not have referred to the critical exchange as a "conversation." Moreover, for each bargaining session the Union had secured the presence of Logan, as a note-taker, and at least one other member of the Local in addition to Underwood. At argument, Simonsen made no suggestion of why the Union would not have had others accompanying Underwood on December 30 if their exchanges happened in a bargaining session. Therefore, it is much more logical that, as Underwood testified, Logan and the others were not present when the exchange of December 30 occurred because Simonsen had canceled the bargaining session of that date. Accordingly, I find that Simonsen and Underwood did not meet on December 30; rather, they had a telephone conversation as Underwood described. That is, I find that on December 30 Simonsen called Underwood and announced that he would not meet with the Union on that date because the parties were at impasse on the issues of drug testing, unit description, journeymen's licenses, and wages.

I have found that the parties were not at impasse on the issues of drug testing and second- and third-year wages when Simonsen announced impasse on December 30. However, assuming that on December 19 the parties had reached an impasse that could have constituted a lawful basis for the unilateral actions by the Respondent, the issue is presented whether that impasse was broken before the Respondent, on January 12, took the unilateral actions that are in question here. As stated in *Hayward Dodge, Inc.*, 292 NLRB 434, 468 (1989):

> There is no impasse where one of the parties makes concessions that are not "trivial or meaningless" (*NLRB v. Webb Furniture Corp.*, 366 F.2d 314, 316 (4th Cir. 1966)), for a concession by either party "on a significant issue in dispute precludes a finding of impasse even if a wide gap between the parties remains because under such circumstances there is reason to believe that further bargaining might produce additional movement." *Old Man's Home of Philadelphia v. NLRB*, 719 F.2d 683, 688 (3d Cir. 1983). The essential question is whether there has been movement sufficient "to open a ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions." *NLRB v. Webb Furniture Corp.*, supra.

In his January 2 letter Underwood specifically addressed the supervisory issue and stated, unequivocally, "we cannot insist on their inclusion." This was a Union concession on the issue. Because that issue was one of only four (or five, if item "2A"

[23] Another case cited by the General Counsel, *Bozzuto's, Inc.*, 277 NLRB 977 (1985), did not involve supervisors; it involved only an attempt to exclude certain part-time employees from a previously recognized bargaining unit. Similarly, *The Idaho Statesman*, 281 NLRB 272 (1986), involved an attempt to exclude previously included employees, not supervisors.

[24] In a January 13 letter, Simonsen told Underwood that "So, unless and until the Union agrees that the Certification provides the bargaining unit definition, apart from other issues, any further negotiation to reach agreement on a new collective-bargaining agreement is futile."

of the Respondent's December 30 letter is counted separately) that divided the parties, and because the Respondent itself contended that negotiations could not succeed if there were not agreement on that issue, it must be concluded that the Union's concession was, at least not "trivial or meaningless" under *Hayward Dodge* and *Webb Furniture Corp*. Indeed, the concession was clearly "significant" under *Hayward Dodge* and *Old Man's Home of Philadelphia*. Therefore, any preexisting impasse was broken by the Union's January 2 concession, and the Respondent should have resumed bargaining, as the Union requested. Refusing, however, to take yes for an answer, Simonsen replied in his letter of January 6 that the parties were nevertheless at impasse because the Union was proposing an agreement that was based on the NECA agreement. By his letter of January 7, Underwood reaffirmed his concession that supervisors were going to be excluded from the unit description of any successor contract, and he again asked that bargaining continue on the other issues between the parties. Simonsen again refused, and the Respondent implemented its December 19 proposal on January 12 by reducing the wage rates of the journeymen to the level of its last proposal, $21.50 (again, a reduction from the 2000 contract's rate of $23.17). That action, I find and conclude, violated Section 8(a)(5), as alleged.

Upon the basis of the foregoing findings of fact and the entire record, I enter the following:

CONCLUSIONS OF LAW

1. The Respondent, Richmond Electrical Services, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees of the employer engaged in performing work within the jurisdiction of the Union.

4. At all times material the Union has been, and is now, the exclusive representative of all employees in the aforesaid bargaining unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act

5. The Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union as the exclusive representative of the employees in the above-described unit by unilaterally implementing its contract proposals at a time that a good-faith impasse had not been reached in bargaining.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Having found that the Respondent, in violation of Section 8(a)(5) and (1) of the Act, unilaterally changed certain terms and conditions of employment of the unit employees, from January 12 through May 2004, by reducing the journeymen's wage rate from $23.17 to $21.50 during that period, I shall recommend that the Respondent restore the status quo ante and make whole the said employees for any loss of pay or other benefits they may have suffered as a result of the Respondent's unfair labor practices in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Specifically, as well as making employees whole for its unilateral action of changing their wage rate, the Respondent shall be required to make the employees whole for any changes that it made in their fund contributions that were to be computed on the basis of that rate or the Respondent's total payroll. The Respondent shall further be required to post, and mail to the employees who were affected by the Respondent's unfair labor practices, an appropriate notice. The mailing shall be required because, although the Respondent had not formally gone out of business at time of trial, it had ceased operating and employing employees.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, Richmond Electrical Services, Inc., of Richmond, Virginia, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the unit employees' terms and conditions of employment without affording the Union an opportunity to bargain about the changes and without bargaining with the Union to either an agreement or good-faith impasse.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) On request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit described above with regard to rates of pay, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) On the Union's request, cancel and rescind all terms and conditions of employment unilaterally implemented on or after January 12, 2004, but nothing in this Order is to be construed as requiring the Respondent to cancel any unilateral changes that benefited the unit employees without a request from the Union.

(c) Make the unit employees whole for any loss of wages or benefits, with interest, that they may have incurred as a result of the Respondent's refusal to bargain and by reasons of all unilateral changes instituted by it in the unit employees' terms and conditions of employment.

(d) Within 14 days after service by the Region, post at its Richmond, Virginia, facilities copies of the attached notice

[25] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The Respondent shall also duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 12, 2004, the approximate date of the first unfair labor practice found herein.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C. September 27, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and obey this notice.

FEDERAL LAW S GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to meet and bargain in good faith over the terms and conditions of a collective-bargaining agreement with International Brotherhood of Electrical Workers, Local 666, AFL–CIO (the Union) as the exclusive bargaining representative of the employees in the following unit (the unit): All employees of the employer engaged in performing work within the jurisdiction of the Union.

WE WILL NOT implement our last offer before the parties have reached an agreement or a lawful impasse during negotiations and WE WILL NOT implement other changes in your terms and conditions of employment before we have reached an agreement or we have reached an impasse in negotiations with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed to you by Section 7 of the National Labor Relations Act.

WE WILL on request, bargain collectively with the Union as the exclusive representative of all employees in the unit with regard to rates of pay, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL make the unit employees whole for any loss of wages or benefits, with interest, that they may have incurred as a result of our refusal to bargain and by reasons of all unilateral changes instituted by us in their terms and conditions of employment, including but not limited to unilateral changes in journeymen's wage rate.

WE WILL, to the extent that we have not already done so, on the Union's request, cancel and rescind all terms and conditions of employment which we unlawfully implemented on or after January 12, 2004, but nothing in this Order is to be construed as requiring us to cancel any unilateral changes that benefited the unit employees without a request from the Union.

RICHMOND ELECTRICAL SERVICES, INC.

[26] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."